United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

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75-5021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter

of

Docket No. 75-5021

FLYING MAILMEN SERVICE, INC.,

Bankrupt

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P/S

CHARLES GOLD,

Plaintiff-Appellant,

v.

HERBERT K. LIPPMAN, Trustee in Bankruptcy of Flying Mailmen Service, Inc.

Defendant-Appellee.

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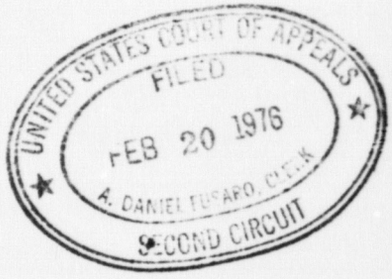

APPELLANT'S APPENDIX

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INDEX TO APPELLANT'S APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

FLYING MAILMEN SERVICE, INC.,

Bankrupt

In Bankruptcy

72 B 172

----------X

CHARLES GOLD,

Plaintiff-Appellant

-against-

HERBERT K. LIPPMAN, Trustee in Bankruptcy of Flying Mailmen Service, Inc.,

Defendant-Appellee

----------X

AGREED STATEMENT UNDER RULE 10(d)

The undersigned, Charles Gold, hereafter designated as "Gold," and the Trustee in Bankruptcy of Flying Mailmen Service, Inc., hereafter designated as "Mailmen," hereby make the following statement of the case pursuant to Rule 10(d) of the Rules of Appellate Procedure.

1. In 1970 Gold instituted a suit in the Supreme Court of the State of New York, County of New York, against

Mailmen and others for the dissolution of Mailmen, the appointment of a receiver pending dissolution, and the restraining of the officers and directors of the corporation from withdrawing any corporate funds or otherwise disposing of any of the property or assets of the corporation. This motion was brought on by order to show cause and was granted in toto by Special Term, Supreme Court, New York County.

2. While an appeal was pending from said order, an agreement to compromise certain claims and repurchase the capital stock of Mailmen owned by Gold was entered into on December 16, 1970, a copy of which is annexed as Exhibit A. Pursuant to this settlement Mailmen agreed to pay Gold $150,000, of which 17% was attributed to the settlement of any claims by Gold against Mailmen and 83% was consideration for the purchase of Gold's shares in Mailmen. Mailmen further agreed to waive any claim against Gold for Litton Industries stock or the proceeds of a certain $5,000 check. $57,500 was then paid and $5,138.88 was to be paid bi-monthly commencing March 1, 1971.

3. Mailmen gave security for the installment payments as provided in paragraph 6 of said agreement.

4. In January 1971, Gold filed a financing statement pursuant to New York's U.C.C. §9-402, a copy of which is

annexed as Exhibit B. The financing statement did not state that Gold was a stockholder of Mailmen or that the statement secured in part the repurchase by Mailmen of its own stock. The financing statement did specifically refer by date to the agreement of December 16, 1970.

5. On February 17, 1972, Mailmen filed a proceeding in the United States District Court for the Southern District of New York under Chapter XI.

6. Prior to the filing of said petition, Mailmen had paid approximately $83,000 to Gold under said agreement.

7. Gold instituted a proceeding in the Bankruptcy Court for the enforcement of the security under the agreement, which came on before Bankruptcy Judge Asa S. Herzog while Mailmen was in Chapter XI.

8. Before an order was entered on Judge Herzog's decision of June 19, 1972 denying Gold's claim, a compromise was entered into by Gold and debtor in possession Mailmen. The compromise was approved by an order of the Referee, which order was to be reviewed by the District Court by the petition of a creditor. Prior to the District Court reviewing the order of compromise, Mailmen was adjudicated a bankrupt and the petition was remanded to the Bankruptcy Court.

delivery of said files and records any portion of the $1,500

9. On remand the Trustee sought to challenge the validity of the 1970 agreement as at the time it was made, but that contention was not considered by the Bankruptcy Judge. On the remand Judge Herzog denied Gold's claim as a secured creditor. Copies of his opinions are annexed as Exhibit C.

10. Gold appealed said decision to the District Court where it was heard by Hon. Morris E. Lasker.

11. By opinion of November 7, 1975, a copy of which is annexed as Exhibit D, Judge Lasker affirmed the decision of the Bankruptcy Judge to the extent that it denied Gold's status as a secured creditor, but remanded the matter for a determination of the date of Mailmen's insolvency and to allow the Trustee to move to amend his answer to challenge the validity of the agreement dated December 16, 1970, and to require Gold to return $11,200.43 received after the institution of the Chapter XI proceeding.

12. Thereupon, an appeal was taken to the

Court of Appeals.

Dated: January 22, 1976

HAYS, ST.JOHN, ABRAMSON & HEILBRON

By: SEYMOUR N. HEILBRON
A Member of the Firm
Attorneys for Charles Gold

STEPHEN J MYDANICK
STEPHEN J. MYDANICK
Attorney for Trustee in Bankruptcy

The foregoing Agreed Statement is approved.

January 28, 1976

S/ MORRIS E. LASKER
United States District Judge

Exhibit A

Security Agreement of December 16, 1970

6a

AGREEMENT made this 16th day of December, 1970, by and between CHARLES GOLD, residing at 85-25 Chelsea Street, Jamaica, N.Y. 11432 (hereinafter called "Gold") and FLYING MAILMEN SERVICE, INC., a corporation organized under the laws of the State of New York and having its principal place of business at 147 Spring Street, New York, New York (hereinafter called "Flying Mailmen"), PARK AVENUE MAIL SERVICE, INC., a corporation organized under the laws of the State of New York and having its principal place of business at 147 Spring Street, New York, New York (hereinafter called "Park Avenue") (Flying Mailmen and Park Avenue being hereinafter sometimes collectively called the "Corporations"), LAURA A. BRADISH, residing at c/o Arthur D. Rabelow, Esq., 42 S. 15th Street, Phila., Pa. (hereinafter called "Laura"). RICHARD J. BRADISH, residing at c/o Arthur D. Rabelow, Esq., 42 S. 15th Street, Phila., Pa. (hereinafter called "Richard"), WALTER ASSENG, residing at c/o Arthur D. Rabelow, Esq., 42 S. 15th Street, Phila., Pa. (hereinafter called "Asseng"), JOSEPH F. KRALLE, residing at c/o Arthur D. Rabelow, Esq., 42 S. 15th Street, Phila., Pa. (hereinafter called "Kralle"), and NICHOLAS PAGANO, residing at c/o Arthur D. Rabelow, Esq., 42 S. 15th Street, Phila., Pa. (hereinafter called "Pagano") (Flying Mailmen, Park Avenue, Laura, Richard, Asseng, Kralle and Pagano being hereinafter sometimes collectively called the "Defendants").

W I T N E S S E T H

WHEREAS, all of the issued and outstanding shares of Park Avenue are owned by Flying Mailmen and Park Avenue is,

therefore, a wholly owned subsidiary of Flying Mailmen; and

WHEREAS, Laura is the owner and holder of fifty-one (51) shares of Common Stock of Flying Mailmen and Gold is the owner and holder of forty-nine (49) shares of Common Stock of Flying Mailmen; and

WHEREAS, Laura and Gold are the sole shareholders of Flying Mailmen; and

WHEREAS, Gold has instituted an Action in the Supreme Court of the State of New York, County of New York, against the Defendants and certain banks, having Index No. 15425/1970 (hereinafter called the "Action"); and

WHEREAS, by order dated October 22, 1970 Justice Paul J. Fino, Sr. ordered the appointment of a Temporary Receiver of the Corporations and did not vacate a Temporary Restraining Order imposed upon certain funds of the Corporations; and

WHEREAS, an Appeal by the Defendants is presently pending in the Appellate Division, First Department (hereinafter called the "Appeal"), to reverse the said order of Justice Fino; and

WHEREAS, pending the determination of the Appeal the Appellate Division has ordered, among other things, that the enforcement of said order of Justice Fino be stayed and that said Temporary Restraining Order be vacated; and

WHEREAS, Gold and the Defendants desire to settle their differences and amicably resolve any and all matters in dispute between them; and

WHEREAS, Gold desires to sell his shares of Flying Mailmen to Flying Mailmen, and Flying Mailmen desires to purchase said shares.

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties hereto hereby agree as follows:

1. Withdrawal of Appeal. Upon the execution of this Agreement the parties hereto shall execute any and all documents, including but not limited to a stipulation, required by the Supreme Court of the State of New York, Appellate Division, First Department, to withdraw the Appeal. Said withdrawal shall be without costs to any of the parties hereto.

2. Discontinuance of the Action. Upon the execution of this Agreement the parties hereto and their attorneys shall execute a stipulation discontinuing the Action with prejudice and without costs to any of the parties hereto, and shall execute any and all additional documents which may be required to ensure that the order of Justice Fino entered on October 22, 1970 and said Temporary Restraining Order in the Action be vacated and of no further force and effect.

3. Legal Expenses of Gold and Expenses of Temporary Receiver. Any and all legal expenses, inclusive of disbursements, of Gold in connection with the Action or in connection with the Appeal shall be borne exclusively by Gold and Gold hereby represents that Samuel Brill, Esq., 253 Broadway, New York, New York 10007 (hereinafter called "Brill"), is the sole attorney who has performed legal services for him in connection with the Action or the Appeal. The fees, charges, costs and expenses of the Temporary Receiver, Irving Aaron, Esq., appointed by Justice Fino pursuant to said order, are in the aggregate sum of $4,125. The Corporations shall pay such fees, charges, costs and expenses to said Temporary Receiver except that ~~$1,000~~ $800 of said sum shall be payable by Gold by the deduction by Flying Mailmen of the sum of ~~$1,000~~ $800 from the last Note payable to Gold pursuant to Paragraph 4 (a) herein, or by deducting said sum of ~~$1,000~~ $800 from the payment due to Gold pursuant to Paragraph 4 (b) herein. Gold or Brill shall consent or stipulate to any order submitted by the Defendants with respect to the discharge of the Temporary Receiver and the payment of his fees, charges, costs and expenses provided such order is consistent with the terms and provisions of this Paragraph.

4. Payment to Gold. (a) In full and final settlement of any and all claims which Gold may have against the Defendants and in consideration of the sale by Gold to Flying

Mailmen of 49 shares of Common Stock of Flying Mailmen, being all of the shares of Flying Mailmen owned by him, Flying Mailmen shall pay to Gold the aggregate sum of $150,000 (hereinafter called the "Purchase Price"), 17% of said Purchase Price being attributable to settlement of said claims and 83% of said Purchase Price being the consideration for the purchase of said shares. The Purchase Price shall be payable to Gold as follows:

(i) Upon the execution of this Agreement the sum of $57,500 by bank, certified or attorneys' check payable to the joint order of Brill and Gold;

(ii) 18 bimonthly payments in the sum of $5,138.88 each commencing March 1, ~~1970~~ 1971.

JJK Las pls

(b) Anything herein contained to the contrary notwithstanding, in the event Flying Mailmen shall pay to Gold on or before March 15, 1971, the aggregate sum of $125,000 together with interest at the rate of ~~7%~~ 7½% per annum on the sum of $67,500 from the date of the execution of this Agreement to and including the date of such payment, then and in such event Gold shall accept said payment as full and final payment of the amounts to be paid to him hereunder and upon receipt thereof the Purchase Price shall

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be deemed paid in full and all of the Notes referred to in Paragraph 5 herein then held by Gold shall be cancelled and returned to Flying Mailmen. Payment to Gold of the amount referred to in this subparagraph 4(b), other than the $57,500 referred to in subparagraph 4(a)(i) herein, shall be payable at Brill's office.

5. Evidence of Indebtedness. Flying Mailmen shall deliver to Gold upon the execution of this Agreement its non-negotiable promissory notes (hereinafter called the "Notes") payable to the order of Gold at Bankers Trust Company, 1345 Ave of the Americas, New York, N.Y. (hereinafter called the "Bank") upon presentation and surrender thereof to Flying Mailmen, in the amounts and at the times in accordance with the provisions of Paragraph 4 (a)(ii) herein. The Notes shall each (i) bear interest at the rate of 7½% per annum, (ii) provide that in the event of a default in the payment of any one Note and if such default continues for a period of ten (10) days from the date payment thereon is due, the entire unpaid balance of all of the Notes shall immediately become due and payable, (iii) provide that Flying Mailmen may, at its sole option, prepay any or all of the Notes at any time prior to the time when any such Notes are due, provided prepayment of any such Notes shall be applied pro rata but not less than $500 per note (except to prepay the entire unpaid balance of the notes) to all of the then remaining unpaid Notes.

of shareholders, shall not be entitled to inspect the cor-

Upon such prepayment of less than the entire amount of the remaining unpaid Notes, Gold shall deliver all Notes in his possession to Brill, who shall exchange such Notes with Flying Mailmen for new notes identical with such Notes, except that such new notes will reflect the unpaid balance of the Purchase Price after such prepayment or, if such new notes are not provided by Flying Mailmen, Brill shall, in the presence of Flying Mailmen, indicate on each of such Notes the amount prepaid thereon; and then Brill shall return such Notes or new notes, as the case may be, to Gold. In the event that the entire amount of the remaining unpaid Notes or new notes is prepaid, all of the Notes and new notes then held by Gold shall be cancelled and returned to Flying Mailmen and the Purchase Price shall be deemed paid in full. Upon prepayment of the new notes, the same procedure shall be followed as though they were the original Notes and Flying Mailmen may prepay portions of the Purchase Price, in such manner, any number of times. A reference to the "Notes", other than in this Paragraph 5, includes the new notes referred to herein.

6. Security. The Corporations hereby grant to Gold as security for the payment of the balance of the

Purchase Price security interests in all of the assets owned by them as of the date hereof and to be owned by them in the future until the Purchase Price is paid in full. Simultaneously with the delivery of the Notes to be delivered pursuant to Paragraph 5 herein the Corporations shall deliver to Gold at the offices of Brill Uniform Commercial Code Financing Statements evidencing such security interests, which Financing Statements shall be executed by the Corporations. Upon payment of the Purchase Price Gold shall deliver to the Corporations Uniform Commercial Code Statements executed by him terminating said security interests. The Corporations shall be free to use, commingle or dispose of all or any part of their assets now owned by them or owned by them in the future, to collect or compromise accounts, contract rights or chattel paper, to use, commingle or dispose of proceeds and to substitute or replace the property which is the subject of said security interests in the ordinary course of their businesses. In the event the Corporations or either of them dispose, in the ordinary course of their businesses, of all or any part of the property to which said security interests shall at any time attach, such security interests shall terminate upon such disposal, but Gold shall retain security interests in the proceeds or replacement property, if any, of such disposed of property.

7. Confession of Judgment. Simultaneously with the delivery of the Notes to be delivered pursuant to Paragraph 5 herein, the Corporations shall each deliver to Brill to be held in escrow by him a Confession of Judgment to Gold in the amount of the balance of the Purchase Price then outstanding. In the event Flying Mailmen defaults in the payment of any of the Notes, and if such default continues for ten days, Brill is authorized to enter and file either or both of said Confessions of Judgment with the County Clerk, New York County, for the sum confessed therein less any amounts paid to Gold as of the date of the entry and filing of either of said Confessions of Judgment. Upon payment of the full Purchase Price to be paid to Gold hereunder Brill shall deliver said Confessions of Judgment to each of the Corporations. Notwithstanding the execution and delivery of both of the aforesaid Confessions of Judgment, it is understood and agreed that Gold shall not be entitled to collect nor receive more than the unpaid balance of the Purchase Price to be paid to him hereunder, together with interest thereon, as provided in Paragraph 5 herein, and upon collection and receipt of said sum he shall execute and deliver to the Corporations satisfactions of said Judgments.

8. Personal Property, Telephone Messages and Mail of Gold.(a) Gold represents that he is the owner of certain personal property presently located on the premises of the Corporations as set forth in Exhibit "A" which is annexed hereto and made a part hereof. Gold shall be permitted to enter upon the premises of the Corporations at reasonable times during daylight hours until January 15, ~~1970~~ 1971 for the sole purpose of removing said property from said premises. The removal of said property shall be at the sole cost and expense of Gold. Anything contained herein to the contrary notwithstanding, Gold shall not enter upon the premises for the purpose of removing said property without the prior consent, either oral or written, of Kralle or Pagano, which consent shall not be unreasonably withheld.

(b) All telephone messages for Gold received by the Corporations shall be referred to a telephone number to be supplied by Gold to the Corporations in writing within one week from the date of the execution of this Agreement. If such number is not received the Corporations shall not be obligated to forward any such telephone messages.

(c) All mail addressed to Gold individually and not as an officer or employee of the Corporations shall be forwarded to Brill or to such other person or address as Gold may select by notice in writing to the Corporations.

9. Airline or Union Strikes or Work Stoppages. If, prior to the payment to Gold of the entire Purchase Price payable to him hereunder, airline or union strikes or work stoppages occur which result in the decline of revenues and sales to the Corporations of twenty-five percent (25%) or more of the revenues and sales which the Corporations normally receive or make during the period of such strikes or work stoppages, then and in such event, the time when each and every payment is to be made to Gold hereunder shall be extended for a period of time equivalent to the length of time during which the sales and revenues of the Corporations so decline.

10. Good Luck Litigation. Brill is presently the attorney of record for Flying Mailmen, which is a defendant in an Action instituted in the Supreme Court of the State of New York, County of New York, Index No. 3299/1969, Calendar No. 69388, entitled "Good Luck Truck Rental, Inc. vs. Flying Mailmen Service, Inc." Upon the execution of this Agreement, Flying Mailmen and Brill shall execute a Substitution of Attorneys whereby Kass, Goodkind, Wechsler & Gerstein are substituted as attorneys of record for Flying Mailmen in such Action, and Brill shall deliver to such firm all of his files and records relating to such Action. Flying Mailmen shall pay to Brill upon the execution of said Substitution of Attorneys and

delivery of said files and records any portion of the $1,500 statement previously rendered by Brill to Flying Mailmen which remains unpaid as of such date, and Brill shall accept such payment in full and final payment of all legal fees and disbursements performed or incurred by him in behalf of Flying Mailmen and Park Avenue.

11. Documents to be Returned by Gold. Upon the execution of this Agreement Gold shall deliver or cause to be delivered to the Corporations the minute book, stock certificate book and stock transfer ledger of Park Avenue and any and all mail, books, records, checks, documents and papers of the Corporations, including but not limited to a Shell Oil credit card, in his possession or in the possession of any member of his family or Brill. Gold shall not retain or make copies of any of such mail, books, records, checks, documents or papers.

12. Cooperation by and Obligation of Gold. (a) Gold shall without charge therefor, cooperate with the Defendants, their counsel and accountants, to (i) obtain satisfactions of judgments from plaintiffs who have obtained judgments against the Corporation or either of them, which judgments have been paid, (ii) determine the facts relative to all existing traffic summonses outstanding against the

Corporations, including but not limited to, whether said summonses have been paid, and (iii) advise the Defendants of negotiations previously conducted by Gold with union with whom the Corporations deal. Gold shall also cooperate with the Defendants and their counsel in connection with the defense of any action presently pending against Flying Mailmen or Park Avenue.

(b) Gold shall be responsible for and pay any and all invoices of airlines rendered to the Corporations in connection with the delivery of certain rugs owned by Gold. Gold hereby agrees to indemnify and hold the Corporations, or either of them, harmless from any and all liabilities, damages, costs and expenses, including reasonable attorneys' fees, incurred by either of the Corporations resulting from Gold's failure or inability to pay said invoices.

13. Restrictions Until Purchase Price is Paid. Until the Purchase Price is paid to Gold the Corporations shall not increase the aggregate compensation paid to Kralle, Pagano, Asseng and Richard by more than the aggregate sum of $30,000 during each and every year that the Purchase Price remains unpaid. Until the Purchase Price is paid to Gold, such compensation shall not be increased at all during the continuance of any default by Flying Mailmen in payment of the Purchase Price hereunder. In addition, until the Purchase Price is paid in full, no dividends shall be paid to any shareholder of Flying Mailmen and neither Flying Mailmen nor Park Avenue shall suspend either of their business operations, except for reasons beyond their control.

14. Escrow of Shares. (a) Upon the execution of this Agreement, Gold shall deliver to Brill the stock certificate representing his ownership of 49 shares of Common Stock of Flying Mailmen with all applicable New York State stock transfer stamps affixed thereto and a stock power in blank with his signature guaranteed by a bank or member firm of the New York Stock Exchange. Said certificate and stock power shall be held in escrow by Brill until the Purchase Price is paid to Gold, at which time they shall be delivered to Flying Mailmen, or until they may be released in accordance with the provisions of Paragraph 15 herein.

(b) Upon the execution of this Agreement, Laura shall deliver to Brill the stock certificates representing her ownership of 51 shares of Common Stock of Flying Mailmen and a stock power in blank with her signature guaranteed by a bank or member firm of the New York Stock Exchange. Said stock certificates shall be held in escrow by Brill until the Purchase Price is paid to Gold, at which time they shall be returned to Laura or until they may be released in accordance with the provisions of Paragraphs 15 or 21 herein.

15. Release of Escrow Shares in the Event of Default. In the event of default by Flying Mailmen in the performance of any of its obligations hereunder, and such default continues for a period of ten days, Gold may exercise his rights in the security interest

granted by the Corporations pursuant to Paragraph 6 herein in order to obtain the balance of the Purchase Price due to him at the time of such default. The Corporations shall deliver to Gold at the end of such ten-day period a complete list of all of their assets as of such date. In the event that Gold does exercise his rights in the security interests, and the net proceeds after the deduction of reasonable expenses and attorneys' fees, if any, obtained by Gold therefrom are insufficient to pay the entire balance of the Purchase Price due to him, Brill may, in behalf of Gold, then sell all or any portion of the shares deposited in escrow by Gold as is necessary to pay the then remaining unpaid balance of the Purchase Price and if such shares cannot be sold or if the proceeds from the sale of all of such shares as can be sold are not sufficient to pay the entire balance of the Purchase Price, he may then sell all or any portion of the shares then owned by Laura or her transferees as is necessary to pay the balance of said Purchase Price. Said shares may be sold at a public or private sale provided that Laura shall be notified in writing at least 20 days prior to any such sale. Prior to the date fixed for such sale Laura shall have the right to purchase any or all of the shares to be sold at a price equivalent to the balance of the Purchase Price then owed to Gold with the interest due thereon. If Laura elects to purchase such shares at such price she shall deliver to Gold a certified or bank check in such amount and Brill

shall deliver to her and Flying Mailmen all of the shares of Flying Mailmen theretofor held in escrow together with the stock powers referred to in Paragraph 14 herein. If Laura does not elect to purchase said shares, and if they are sold at any such public or private sale, the proceeds of the sale in excess of the balance of the Purchase Price then due to Gold together with interest thereon and reasonable costs and expenses of such sale, including reasonable attorneys' fees shall be paid by Brill to Laura and Flying Mailmen upon his receipt thereof and Brill shall deliver to Laura and Flying Mailmen any remaining shares not so sold. Upon payment of the entire unpaid balance of the Purchase Price from the proceeds of the sale of the shares (to Laura or otherwise), the Purchase Price shall be deemed paid in full and the Notes then held by Gold shall be cancelled and returned to Flying Mailmen.

16. Exchange of Releases. Upon the execution of this Agreement, Gold shall deliver to the Defendants a general release from Gold to the Defendants excluding therefrom the obligations of the Defendants or any of them pursuant to the terms of this Agreement and the Defendants shall deliver to Gold a general release excluding therefrom the obligations of Gold pursuant to the terms of this Agreement.

17. No Admission. The execution of this Agreement by Gold and the Defendants or the performance by them of any term herein shall not constitute or be deemed to be an admission by them as to any allegation against them contained in any of the pleadings, proceedings or affidavits in the Action or Appeal.

18. Power of Attorney. Upon the execution of this Agreement, the Defendants shall deliver to Kass, Goodkind, Wechsler & Gerstein a special power of attorney empowering them to execute and deliver any and all Notes, Confessions of Judgment, Financing Statements or other documents required to be delivered by the Defendants pursuant to the terms of this Agreement.

19. Resignation by Gold. Gold hereby resigns from any position that he now holds as an employee, officer and/or director of either or both of the Corporations.

20. Warranties and Representations.

(a) Gold warrants and represents to the Defendants that he is the owner and holder of 49 shares of Common Stock of Flying Mailmen, said shares are free

and clear of all liens and encumbrances and that the execution of this Agreement by him will not be contrary to or in violation of any other agreement with any other party; and that he is not a shareholder of Park Avenue and that, other than the said 49 shares of Common Stock of Flying Mailmen, he has no other rights of ownership in either of the Corporations. Gold also warrants that, since Sept. 14, 197 he has not charged, or caused to be charged, to either of the Corporations any costs, fees or expenses in excess of $250.

(b) Laura warrants and represents to Gold that she is the owner and holder of 51 shares of Common Stock of Flying Mailmen, said shares are free and clear of all liens and encumbrances and that the execution of this Agreement by her will not be contrary to or in violation of any other agreement with any other party.

(c) The Corporations warrant and represent that since September 14, 1970 there has been no substantial adverse change in the condition of their businesses other than the loss of the E. F. Hutton account, and they have incurred no obligations since such date except those incurred in the ordinary course of business and except extraordinary legal and accountants' expenses incurred in connection with the Action, Appeal and the transactions contemplated hereunder. The Corporations further warrant

and represent that they have not delivered Confessions of Judgment to any party other than the Confession of Judgment to be delivered hereunder.

(d) Gold warrants and represents to the Defendants that he has not wrongfully appropriated or caused to be wrongfully appropriated any property belonging to the Defendants. Defendants hereby waive any and all claims which they may have or heretofore had against Gold relating to all shares of Liston Industries and the proceeds of a $5,000 check drawn by Park Ave to the order of United Crown Ltd and marked "Telestar Loan".

FK-Laura ply

21. Transfer of Shares by Laura. Anything to the contrary contained herein notwithstanding, Laura may at any time with or without consideration therefor transfer all or any portion of the shares of Flying Mailmen owned by her to any other party or parties provided that such party or parties agree to be bound by all of the terms and conditions of this Agreement in the same manner and to the same extent as Laura. In the event of any such transfer of shares, the transferees shall succeed to all of the rights, privileges and benefits to be received by Laura hereunder. Upon receipt of notification from Laura of any such transfer, and upon receipt from the transferee or transferees of a like number of shares, stock powers endorsed in blank with signatures guaranteed by a bank or member firm of the New York Stock Exchange and

an agreement by the transferees in writing to be bound by the terms and conditions of this Agreement to the same extent as Laura, Brill shall release Laura's shares and stock power held by him in escrow pursuant to Paragraph 14 herein and deliver them to the Secretary of Flying Mailmen for surrender and cancellation.

22. Title to Escrow Shares. Title and all rights of ownership in and to all of the shares of Flying Mailmen held in escrow by Brill and deposited by Laura shall remain in Laura or her transferees. Title and all rights of ownership in and to the shares of Flying Mailmen held in escrow by Brill and deposited by Gold shall be deemed transferred to Flying Mailmen as of the date of the execution of this Agreement. For purposes of this Agreement, neither Gold nor Brill shall be deemed a transferee of Laura. As of the date hereof Gold shall have no rights of ownership of the shares of Flying Mailmen so deposited by him in escrow, nor shall he be deemed to have the rights of a shareholder of Flying Mailmen. Gold hereby waives any right he may have to receive notice of any special or annual meeting of shareholders of Flying Mailmen, shall not attend any such meetings

of shareholders, shall not be entitled to inspect the corporate minute books, stock certificate books or stock transfer ledgers of Flying Mailmen, and shall not institute or cause to be instituted any suit or proceeding against the Corporations or either of them or the officers, shareholders, directors or employees thereof for waste, mismanagement, dissolution, or for any other cause whatsoever, pertaining or relating to the business of or being conducted by either Corporation. If Flying Mailmen shall default in the payment of the Purchase Price, and if such default continues for ten days, in addition to any other rights which Gold may have by operation of law or otherwise provided herein, the Corporations shall furnish to Gold, without charge, a copy of each of their annual financial statements when prepared by their accountants subsequent to the date of default and until the Purchase Price is paid in full.

23. Recapitalization of Flying Mailmen. If Flying Mailmen should be recapitalized prior to the time when Gold receives payment of the balance of the Purchase Price, the shares of Laura and Gold held in escrow by Brill pursuant to Paragraph 14 herein shall be exchanged by Brill for the shares to which either Gold or Laura, or her transferees, would be entitled pursuant to such recapitalization and said recapitalized shares shall continue to be held in escrow by Brill pursuant to the terms of this Agreement.

24. Voting by Laura. Neither Laura nor the transferees of her shares of Flying Mailmen shall vote at any special or annual meeting of shareholders of Flying Mailmen to dissolve, merge or consolidate said corporation unless said corporation receives reasonably adequate consideration therefor and provided that Flying Mailmen is the surviving or controlling corporation in any such merger or consolidation.

25. Covenants by Gold and Defendants.

JK Lass bly

~~(a)~~ It is understood that Gold intends to engage in a business or businesses which may be competitive or similar to the businesses of the Corporations. Gold covenants and warrants to the Defendants and each of them that he will not, directly or indirectly, solicit present or future employees of the Corporations to leave the employ of the Corporations or either of them. Gold further covenants and warrants that he will not at any time in the future disparage or malign either of the Corporations, their businesses past or present, officers, directors, shareholders, employees or methods of operation. Gold may not solicit the present customers of either Corporation or request or suggest that any such customers

terminate their relationships with either Corporation, except in connection with a business competitive with the business of either such Corporation of which he is a shareholder, officer, director, owner, employee or partner. In no event shall such solicitation of customers of either Corporation be in a manner that is inconsistent with the covenants and warranties of Gold hereinbefore contained in this Paragraph. In the event Gold violates any of his covenants or warranties contained in this Paragraph the Defendants or any of them may, in addition to any other remedies, obtain an injunction in any Court having proper jurisdiction, enjoining Gold from continuing to violate said covenants or warranties. The Defendants covenant and warrant that they will not in any time in the future disparage or malign Gold, his businesses past or present, or any officers, directors, shareholders, employees or methods of operation of any business with which he is associated or employed. In the event the Defendants or any of them violate any of their covenants or warranties contained in this Paragraph Gold may, in addition to any other remedies, obtain an injunction in any Court having proper jurisdiction, enjoining said Defendants from continuing to violate said covenants or warranties. Nothing herein contained shall prevent or bar Gold, or any business with which he is or may be affiliated, from employing any employee of the Corporations who has not been solicited away from the Corporations (or either of them) in violation of the Provisions of this Paragraph 25, provided that such employee does not have an existing written employment agreement with either of the Corporations.

OK Lab
pb

26. Non-Interference by Gold. Except as provided in Paragraph 8 herein, Gold shall not enter upon the premises of either Corporation and shall not in any manner interfere with the conduct of their businesses. In addition, he shall not communicate with customers, banks, suppliers or other parties with whom the Corporations do business, except in accordance with Paragraph 25 herein.

27. [Intentionally Omitted] ~~Remedies for Breach. The parties agree and acknowledge that any breach hereof would cause irreparable damage and that the parties hereto may obtain relief by way of injunction, specific performance or such other equitable relief that they may be entitled to and may obtain any other relief permitted under and pursuant to law.~~

28. Benefit of Agreement. This Agreement shall be binding upon and inure to the benefit of the distributees, representatives, successors and assigns of the parties hereto.

29. Notices. All notices required to be given or sent hereunder shall be in writing and shall be mailed by United States mail registered or certified, return receipt requested; and if sent to any of the Defendants shall be addressed to them at their addresses as set forth on the first page of this Agreement, with a copy to Kass, Goodkind, Wechsler & Gerstein, 122 East 42nd Street, New York, New York 10017; if delivered or sent to Gold same shall be addressed to him at his address as set forth on the first page of this Agreement, with a copy to Brill.

30. Governing Law. This Agreement and the performance and interpretation thereof shall be governed by the laws of the State of New York.

31. Modification or Amendment of Agreement. No modification or amendment of this Agreement shall be effective or binding unless signed by all of the parties hereto.

32. Entire Agreement. This document embodies the entire Agreement between the parties hereto and there are no other understandings, agreements or representations expressed

or implied.

33. Paragraph Headings. The paragraph headings contained herein are solely for convenience.

34. Invalidity of Agreement. The invalidity of any paragraph, clause, term or provision of this Agreement shall not affect the remaining paragraphs, clauses, terms or provisions of this Agreement, which shall remain in full force and effect.

35. Waiver. The waiver by any of the parties hereto of the performance of any term or provision of this Agreement by any of the other parties hereto shall be for that one time only and shall not be deemed to be a waiver of any other term or provision of this Agreement.

36. Default by Insolvency. The filing of a petition by or against either of the Corporations in any Federal or State insolvency proceeding shall constitute a default by Flying Mailmen of its obligations to pay Gold pursuant to Paragraph 4 herein, provided such proceeding is not terminated, discharged or vacated within twenty (20) days from the date of the commencement thereof.

37. Execution of Documents. Each of the parties hereto agrees to execute any and all documents or instruments

which the attorneys for the parties reasonably require to be executed for the purpose of effectuating the transactions contemplated hereunder.

38. Release of Funds. Upon the execution of this Agreement, the Corporations shall be free to withdraw or utilize any or all of their funds on deposit with Bankers Trust Company or any other bank in any manner they deem advisable and any agreement between the parties hereto or their attorneys to the contrary shall be deemed null and void.

39. Legend on Share Certificates. Upon receipt of the certificates for the shares to be held in escrow, Brill shall place on each such certificate the following legend:

"The shares represented by this certificate, and the transfer thereof, are subject to an agreement dated December 16, 1970 between Charles Gold, Flying Mailmen Service, Inc., Park Avenue Mail Service, Inc., Laura Bradish, Richard J. Bradish, Walter Asseng, Joseph Kralle and Nicholas Pagano."

40. Successor to Brill. If Brill is unable to perform any or all of the functions described herein to be performed by him, by reason of death, incompetency, or for any other reason, such functions shall be performed by ~~Kass, Goodkind, Wechsler & Gerstein; and in such event, all Notes,~~ If Brill is a bank or firm of attorneys as successor to Brill located in the city of New York, designated by Gold in writing and reasonably acceptable to the attorneys for the Defendants; and if such designation is not made within 60 days then the attorneys for the Defendants shall designate in writing such successor, which may be such attorneys; and in such event, all

payments or other documents or instruments to be delivered to or payable at the office of Brill shall be delivered to or payable at the offices of such successor ~~Kass, Goodkind, Wechsler & Gerstein~~, and all ~~Notes,~~ checks, documents, certificates or instruments theretofor in Brill's possession shall be delivered by Brill or his representative to such successor, ~~Kass, Goodkind, Wechsler & Gerstein.~~

41. Counterparts - This agreement may be executed in counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement or caused it to be executed by their duly authorized officers as of the date and year first above

written.

Charles Gold

FLYING MAILMEN SERVICE, INC.

By: _____

PARK AVENUE MAIL SERVICE, INC.

By: _____

Laura Bradish

Richard J. Bradish

Walter Asseng

Joseph Kralle

Nicholas Pagano

Agreed to with respect to functions attributable to the undersigned:

Samuel Brill

Agreed to as Brill's successor:

Kass, Goodkind, Wechsler & Gerstein

SCHEDULE A

1 Legal file
1 Letter file
1 Stationery cabinet
1 Leather desk set and leather trays
1 Arm chair
1 Straight chair
3 Typewriters
~~1 Large wooden bookcase~~
Miscellaneous books and personal files
1 Comptometer

Exhibit B

Financing Statement

This FINANCING STATEMENT is presented to a Filing Officer for filing pursuant to the Uniform Commercial Code.

No. of Additional Sheets Presented:

Maturity Date 3. (optional):

1. Debtor(s) (Last Name First) and Address(es):
Park Avenue Mail Service, Inc.
147 Spring Street
New York, New York

2. Secured Party(ies): Name(s) and Address(es):
Charles Gold
85-25 Chelsea Street
Jamaica, New York

4. For Filing Officer: Date, Time, No.-Filing Office

5. This Financing Statement covers the following types (or items) of property:
All assets now owned, and to be owned in the future, by the debtor. (Debtor may freely dispose of any or all of the collateral, in the ordinary course of its business, free from the Security Interest therein.) (See Attached Sheet)

☒ Proceeds — ☒ Products of the Collateral are also covered.

6. Assignee(s) of Secured Party and Address(es)

7. ☐ The described crops are growing or to be grown on: *
☐ The described goods are or are to be affixed to: *
* (Describe Real Estate Below).

8. Describe Real Estate Here:

9. Name(s) of Record Owner(s):

No. & Street | Town or City | County | Section | Block | Lot

10. This statement is filed without the debtor's signature to perfect a security interest in collateral (check appropriate box)

☐ under a security agreement signed by debtor authorizing secured party to file this statement, or
☐ already subject to a security interest in another jurisdiction when it was brought into this state, or
☐ which is proceeds of the original collateral described above in which a security interest was perfected

Park Avenue Mail Service, Inc.

By Signature(s) of Debtor(s)

Charles Gold

By Signature(s) of Secured Party(ies)

(5) File Copy — Secured Party

9/65 STANDARD FORM NEW YORK STATE FORM UCC-1 — Approved by John P. Lomenzo, Secretary of State of New York

Continuation of Statement in Item 5:

This Financing Statement has been executed pursuant to an agreement, dated December 16, 1970, between Charles Gold, the Secured Party, and Park Avenue Mail Service, Inc., Flying Mailmen Service, Inc., and other parties, Debtors, granting to Gold security interests in all of the assets owned by debtor Park Avenue Mail Service, Inc. and to be owned by said debtor in the future. It includes accounts receivable, fixtures and equipment, motor vehicles and all other assets now owned or to be owned in the future. The motor vehicle presently included is a 1969 GMC Large Van, Serial No. EM40VC084 982, Model No. EM4DU.

Exhibit C

Decision of Referee Herzog On Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In the Matter :

-Of- :

FLYING MAILMEN SERVICE, INC., : No. 72-B-172

Debtor. :

----------X

DECISION ON MOTION OF CHARLES GOLD

APPEARANCES:

LEVIN & WEINTRAUB, ESQS.
Attorneys for Debtor
by: CHARLES H. WEINTRAUB, ESQ. and
PHILIP R. MANN, ESQS., of Counsel

SAMUEL BRILL, ESQ.
Attorney for Charles Gold

ASA S. HERZOG, Referee:

Petitioner, Charles Gold, moves for an order (1) adjudging that the debtor in possession failed to enter into a certain agreement heretofore authorized by this court; (2) adjudging that the debtor in possession has defaulted in an agreement dated December 16, 1970, settling certain litigation, thereby also failing to comply with the order of this court authorizing settlement

of Gold's claim and (3) adjudging that unless the full amount owing to Gold pursuant to said order be paid forthwith, Gold may deem the entire balance immediately due and may look to certain security in satisfaction of his claim.

The undisputed facts are these: On December 16, 1970, in settlement of an action pending in the New York Supreme Court, the debtor agreed to pay to Gold the sum of $150,000.00, to be apportioned as follows: 17% in settlement of certain claims against the debtor, and 83% to the repurchase of forty-nine shares of the debtor's common capital stock held by Gold. $57,000.00 was paid upon the execution of the agreement, and the balance was to be paid in eighteen bimonthly instalments of $5,138.88, commencing March 1, 1971. To secure payment, under the agreement, debtor granted to Gold a security interest in all of its assets, present and future, and Gold duly filed a financing statement as required by the New York Uniform Commercial Code. Approximately $83,000.00 was paid pursuant to the terms of the said agreement by the time the petition for an arrangement was filed herein on February 17, 1972.

On February 24, 1972, this court made an order authorizing the debtor in possession to finance its present and future accounts receivable with Commercial

Trading Company (Commercial) and said order provided, inter alia, that said Commercial satisfy the lien claim of Gold by the payment to him of the sum of $50,000.00, and authorizing Gold to file a priority administration claim for an additional $7,500.00 - thus settling the Gold claim for the aggregate sum of $57,500.00.

Thereafter, on March 8, 1972, the sum of $5,529.46 was paid over to Gold's attorney to be held in escrow and conditioned upon consummation of the Commercial transaction.

The Commercial transaction was never consummated and consequently the provisions of the order of this court dated February 24, 1972, are of no effect with the result that the parties are restored to the status they enjoyed immediately prior to the entry of said order.

Since it is undisputed that the debtor defaulted under the agreement dated December 16, 1970, and undoubtedly under the terms thereof the entire balance due thereunder became immediately payable, the essential question before this court relates to the validity of the agreement of December 16, 1970, and of the security interest given to secure performance thereunder. There is no dispute as to solvency of the debtor when it entered into the agreement of December 16, 1970 or that it was insolvent on

February 17, 1972, when the petition for an arrangement was filed herein.

The position of the debtor in possession is that the executory portion of the agreement is unenforceable by reason of such insolvency and that the security interest given thereunder falls with the agreement.

Gold's position is that solvency on the date of the agreement, i.e., December 16, 1970, is controlling and that in any event the security interest is binding upon subsequent creditors because of constructive notice resulting from a proper U.C.C. filing of a Financing Statement.

Section 513(a) of the Business Corporation Law of the State of New York provides:

> "(a) A corporation, subject to any restrictions contained in its certificate of incorporation, may purchase its own shares, or redeem its redeemable shares, out of surplus except when currently the corporation is insolvent or would thereby be made insolvent." (Emphasis added)

Gold points to the word "currently" in said § 513(a), and asserts that since the debt was solvent on December 16, 1970, when the agreement was executed, the debtor could properly repurchase its own shares. I must disagree with this argument.

Section 514(b) of the Business Corporation Law provides:

> "(b) The possibility that a corporation may not be able to purchase its shares under Section 513 shall not be a ground for denying to either party specific performance of an agreement for the purchase by a corporation of its own shares, if at the time for performance the corporation can purchase all or part of such shares under Section 513." (Emphasis added)

This Section makes it perfectly clear that although an agreement to purchase shares be made at a time when the corporation is solvent, enforcement of the contract will be denied if insolvency exists at the time of performance as called for in the contract.

In Baxter v. Lancer Industries, Inc., 213 F.Supp. 92 (E.D.N.Y. 1963) the court said:

> "Promises to repurchase, such as that involved in the instant case, must be viewed as conditioned by the requirement that, at the time the corporation is called on to perform, it must have sufficient funds so that disbursement for the repurchase will not involve the use of funds not authorized to be so used by the applicable state law. Thus it has been said that the statute is, in effect, read into the agreement . . . ."

In Cross v. Beguelin, 252 N.Y. 262, the New York Court of Appeals said:

> "When made, the agreement with Ferdinand

> Cross was valid. Then a surplus existed. After the corporation became financially embarrassed and the surplus shrank to a deficit, the agreement became unenforceable against the corporation."

Gold argues that the Beguelin case stands for the proposition that "The rights of the seller of the stock appear to be superior to those of subsequent creditors of the corporation who became such with notice of the purchase by the corporation of its own stock." His point is that filing the U.C.C. Financing Statement was tantamount to notice to subsequent creditors. Gold relies upon Huron Milling Company v. Hedges, 257 F.2d 258 (2d Cir. 1958) where the court said:

> "The remaining contention is that Huron is barred from a recovery because it elected to become a creditor with notice of the illegal purchase of the stock on June 18, 1952. That such a principle of law is recognized both in federal and state decisions is undoubtedly correct." (Citing Cross v. Beguelin, supra.)

But what Gold overlooks is that in Huron Milling the court found that Huron had actual knowledge of the stock purchase. Huron has received auditor's reports from which the conclusion was "inescapable" that Huron had actual knowledge.

I hold that the filing of the U.C.C. Statement,

which is entirely barren of any reference to the repurchase of shares of stock, does not constitute notice to subsequent creditors of the nature of the transaction.

In In re Bay Ridge Inn, 98 F.2d 85 (2d Cir. 1938), the court said:

> "The suggestion that Section 58 should not be applied because the mortgage was duly filed and the creditors had constructive notice of the lien created thereby is without merit. On its face the mortgage indicated a consideration moving to the corporation .... The loan was never made and the mortgage was used not to obtain funds for the corporation, but only to give the mortgagees security when they sold their stock. The record gave no notice to creditors of what actually occurred. Creditors who examined the record would have had reason to suppose that the corporate assets were augmented by the amount of a loan of $2025, instead of being depleted by payments to the mortgagees." (Emphasis added)

See also In re Dawson Brothers Construction Co., 218 F.Supp. 411 (N.D.N.Y. 1913).

In the instant case, the Statement merely indicates that it was executed pursuant to an agreement dated December 16, 1970, without disclosing the nature of that agreement or even the amount involved. Creditors who examine this statement would be perfectly justified in assuming that the security was collateral for a loan to the corporation. Certainly, the statement gives not

the slightest inkling that a repurchase of the debtor's shares was involved.

Gold heavily relies upon First Trust Co. v. Illinois Cent. R. Co., 256 Fed. 830, cert. denied, 249 U.S. 615, but overlooks that fact that in that case the mortgage contained the express recital: "Whereas, it now appears necessary and proper for the purpose of purchasing 1,125 shares of its capital stock from its present shareholders . . . the railroad company has now resolved to issue . . . bonds." Thus, it is clear that those who examined the recorded document would have had actual notice that the corporation was purchasing its own shares.

As noted at the outset, the December 16, 1970 agreement apportioned the $150,000.00 settlement as follows: - 17% on account of certain claims Gold was asserting against the debtor, and 83% on account of the repurchase of the stock. Accordingly, $25,500.00 was allocated to settlement of Gold's claims, and $124,500.00 on account of repurchase of the shares of debtor's stock. At the time the petition was filed, approximately $83,000.00 was paid by the debtor under the terms of the agreement. I hold, that of this $83,000.00 the sum of $25,500.00 must be applied to the payment of the 17%

allocated by the agreement to the settlement of Gold's claims against the debtor. That means that some $57,500.00 was paid on account of the repurchase of the debtor's stock by the date of the filing of the arrangement petition herein.

In re Bell Tone Records, Inc., 86 F.Supp. 806 (D.N.J. 1949) presented an almost identical situation. There, a chattel mortgage was given to cover two distinct debts: one, the debt created by the purchase by the bankrupt of its own stock, and two, the debt created by the advance or funds by the mortgagee to pay certain debts of the bankrupt. As in the instant case, there were actually two severable claims, each of which, the court said, must be regarded as separate and distinct transactions. As in the instant case, the purchase of the stock was not made out of surplus in contravention of a state statute very similar to the New York statute. As in the instant case, payments were made on account, and the problem facing the court was the proper allocation of such payments. The court said at page 810:

> "These payments may not be credited to the claim for the purchase price of the stock but must be credited to the claim for the monies advanced on behalf of and to the bankrupt. The allocation of these payments

> would permit Shirley Droutman to recover a part of the purchase price of the stock and avoid the personal liability created by the statute hereinabove quoted. The allocation of the payments to the purchase price of the stock or any part thereof would violate not only the statute but also the equitable principles by which the court of bankruptcy must be guided." (Emphasis added)

Since the agreement, insofar as it remains executory, is not enforceable, the question of whether Gold's claim be subordinated or expunged could be said to be academic. In In re Dawson Brothers Construction Co., 218 F.Supp. 411 (N.D.N.Y. 1963) the referee expunged the claim but the judge, on review, agreeing it made little difference because the assets in the estate would not equal in amount the claims of general creditors, expressed the view that rather than expunge the claim, it should be subordinated to the claims of general creditors. I agree with this view and hold that Gold's claim be relegated to a rank inferior to that of general creditors.

Accordingly, I find the executory portion of the agreement of December 16, 1970, to be unenforceable and that the debtor is not required to make payments thereunder. I also find the security agreement to be unenforceable. It requires no citation of authority to support the

proposition that a security agreement given to secure an unenforceable obligation, is likewise unenforceable. I find that the balance due under the agreement constitutes an unsecured claim against the estate which must be subordinated to the claims of all other general creditors. I find that the payment of $5,529.46 made after the filing of the petition herein was improper and I direct the return thereof to the debtor.

Gold will be perpetually enjoined from taking any steps to foreclose the security agreement and will be directed to execute and deliver to the debtor the necessary documents to discharge the security interest of record.

Settle order in conformity with the foregoing on three days' notice.

Dated: New York, New York
June 16, 1972

Referee in Bankruptcy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In the Matter :

-of- :

No. 72-B-172

FLYING MAILMEN SERVICE, INC., :

Debtor. :

----------X

SUPPLEMENTAL DECISION ON MOTION OF CHARLES GOLD

APPEARANCES:

LEVIN & WEINTRAUB, ESQS.
Attorneys for Debtor
By: CHARLES H. WEINTRAUB, ESQ. and
PHILIP R. MANN, ESQ., of Counsel

SAMUEL BRILL, ESQ.
Attorney for Charles Gold

ASA S. HERZOG, Referee:

In my decision dated June 16, 1972, I indicated (p. 2) that on March 8, 1972, subsequent to the filing of the petition for an arrangement herein, $5,529.46 was paid over to Gold's attorney to be held in escrow. I found this payment improper and directed the return thereof (p. 11).

It has been called to my attention that in addition, a payment was made to Gold on or about May 1,

1972, in the sum of $5,670.97. Payment was without prejudice and subject to determination of the issues raised by the Gold application and the debtor's answer.

In view of my decision of June 16, 1972, this payment of $5,670.97 must also be returned to the debtor, and the order to be settled in conformity with the aforesaid decision shall contain provision therefor.

Dated: June 19, 1972
New York, New York

Referee in Bankruptcy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	
-of-	:	In Bankruptcy
FLYING MAILMEN SERVICE, INC.,	:	No. 72 B 172
Bankrupt.	:	

DECISION ON REARGUMENT
OF MOTION OF CHARLES GOLD

APPEARANCES:

STEPHEN J. MYDANICK, ESQ.,
Attorney for Trustee,
HERBERT J. LIPPMAN, ESQ.

HENRY & BRECKER, ESQS.,
By: MARTIN F. BRECKER, ESQ.,
Attorneys for Charles Gold

ASA S. HERZOG, Bankruptcy Judge:

Charles Gold, an alleged secured creditor herein, seeks reargument of my decision of June 16, 1972 as supplemented by my decision of June 19, 1972.

A brief history of the controversy is in order. The matter first came before this court when an order was entered authorizing settlement of Gold's claim. For reasons unimportant at this juncture, the debtor in possession did not comply with the settlement agreement, and Gold moved this court for an order adjudging that unless the full amount due him pursuant to the settlement order be paid forthwith, he could deem the entire balance immediately due and look to certain security in satisfaction of his claim.

The debtor opposed the motion on the ground that the executory portion of the agreement which created Gold's lien is unenforceable by reason of §513(a) of the Business Corporation Law of the State of New York. In my decision of June 16, 1972 I recited the undisputed facts to be these:

"On December 16, 1970, in settlement of an action pending in the New York Supreme Court, the debtor agreed to pay to Gold the sum of $150,000.00, to be apportioned as follows: 17% in settlement of certain claims against the debtor, and 83% to the repurchase of forty-nine shares

of the debtor's common capital stock held by Gold. $57,000.00 was paid upon the execution of the agreement, and the balance was to be paid in eighteen bimonthly instalments of $5,138.88, commencing March 1, 1971. To secure payment, under the agreement, debtor granted to Gold a security interest in all of its assets, present and future, and Gold duly filed a financing statement as required by the New York Uniform Commercial Code. Approximately $83,000.00 was paid pursuant to the terms of the said agreement by the time the petition for an arrangement was filed herein on February 17, 1972."

It is undisputed that the debtor defaulted under the December 16, 1970 agreement and that under the terms thereof the entire balance due thereunder became immediately payable.

I held, in my said decision of June 16, 1972, that of the $83,000 paid to Gold before the filing of the Chapter XI petition, $25,500 must be applied to the payment of the 17% allocated by the agreement to the settlement of Gold's claims against the debtor, and that "some" $57,500 was paid on account of the repurchase of the debtor's stock. On that

basis, the amount remaining due under the December 16, 1970 agreement, $67,000, must be allocated to completion of payment on account of repurchase of the stock.

Based on my finding that debtor was insolvent on the date of commencement of the Chapter XI case,* I held that the executory portion of the agreement of December 16, 1970 and the security agreement given to secure the obligation were unenforceable because of §513(a) of the New York Business Law which permits a corporation to purchase its own shares of stock out of surplus except when the corporation is insolvent or would thereby be made insolvent.

No order was entered on this decision. Instead, in order to avoid the delays that would result from appeals and probably endanger any plans for effecting an arrangement, the debtor entered into a new settlement agreement with Gold. The compromise was strongly opposed by a creditor who thereafter petitioned to review my order approving the settlement of the controversy.

While the appeal was pending, however, the debtor

---

* The question of solvency will be discussed infra.

was adjudicated a bankrupt and a trustee in bankruptcy was appointed and qualified. Under these new circumstances, the basic reason for my approving the compromise no longer existed, and at my request, the District Judge who heard the appeal remanded the matter to me for reconsideration. I set the matter down for rehearing at which time, after hearing argument, I vacated the order approving the compromise and stated that I would treat the proceeding then before me as a motion by Gold for reargument of my original decision of June 16, 1972. This procedure acceded to by the attorneys for Gold and for the trustee in bankruptcy.

In his brief in support of reconsideration, Gold argues that I failed to make sufficient findings as required by former General Order 47. The facts were not in dispute. At the original hearing I inquired of Gold's then attorney whether testimony would be necessary. His response was:

> "Mr. Brill: I don't think so. I think the facts are beyond dispute." (SMp6)

My decision of June 16, 1972 recites these undisputed facts. My decision hinged on the insolvency of the debtor

on the date the Chapter XI petition was filed. As to that question, I found as follows:

> "There is no dispute as to solvency of the debtor when it entered into the agreement of December 16, 1970 or that it was insolvent on February 17, 1972, when the petition for an arrangement was filed by him." (Decision, pp. 3-4).

There was ample support for this finding. At the original hearing the debtor's attorney stated

> " . . . and not disputed by them that presently there is not a surplus, and a surplus means an existence of assets and pay-in capital, and perforce where we have liabilities exceeding assets there could not be a surplus, and it is not disputed . . . in other words, if a surplus existed at that time, that surplus does not exist at this time." (SMp9)

Not only was insolvency at the date of filing the petition undisputed by the parties at the hearing, but the petition for an arrangement states that the debt was then insolvent and unable to pay its debts as they matured. The balance sheet which accompanied the petition showed that as of December 31, 1971 the debtor had assets of approximately $321,701, as against liabilities of $737,385.

Moreover, the schedules filed in this case show as of the date of the filing of the petition assets aggregating $214,100 as against liabilities aggregating $620,862.47.

As noted above, my decision of June 16, 1972 hinged on debtor's insolvency on the date of the filing of the petition. The insolvency referred to in §513(a) of the New York Business Law is defined in §102(8) as follows:

> " 'insolvent' means being unable to pay debts as they become due in the usual course of the debtors' business."

There is ample support for my finding of insolvency on the date the petition was filed in both the bankruptcy sense, that is insufficient assets to meet liabilities, as well as in the equity sense as that term is defined in the New York Business Law.

Gold argues that I erred in allocating 17% or $25,500 of the $83,000 paid prior to the filing of the petition to payment of the debt. He takes the position that he could apply the entire sum of $83,000 on account of the repurchase of the debtor's stock. In other words,

he is saying that he may apply $25,500 of the amount still due him to on the debt and that therefore, in any event, his lien is valid to that extent. He states in his brief that "it is arguable" that he had the right to apply the payments which he received "which were received without instructions as to application" to such of the debts as he chose and he cited three New York cases to support that proposition.

The weakness of that argument is that the parties did in fact agree as to the allocation of the payments:

> "In full and final settlement of any and all claims which Gold may have against defendants (the debtor). . . . . Flying Mailmen shall pay to Gold the aggregate sum of $150,000 (hereinafter called the "Purchase Price"), 17% of said Purchase Price being attributable to settlement of said claims and 83% of said Purchase Price being the consideration for the purchase of said shares."
>
> [Agreement, December 16, 1970, ¶4. Debtor's Exh. 1].

Therefore, in allocating 17% of the $83,000 paid prior to the filing of the petition to payment of Gold's claims and 83% on account of repurchase of the stock, I

am merely carrying out the clearly expressed intentions of the parties. Bank of California v. Webb, 94 N.Y. 467, Shahmoon Industries v. Peerless Insurance, 226 N.Y.S. 2d 997, and Smith v. Rothman 6 A.D. 2d 859, cited by Gold, are inapposite because the debtors in those cases had made no specific allocation or direction as to the application of the payments made to the creditors. In the instant case, however, the allocation was specified in the agreement between the parties.

No sound reason for reversing my decision of June 16, 1972, as supplemented by my decision of June 19, 1972. The trustee will settle an order in accordance with those decisions on 5 days' notice, the order to contain a stay of execution thereof for 10 days after entry and if Gold files a notice of appeal therefrom, then until determination of said appeal.

Dated: New York, New York
July 1, 1974

Asa S. Herzog
ASA S. HERZOG
Bankruptcy Judge

Exhibit D

Opinion of Judge Lasker

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

In the Matter

of

FLYING MAILMEN SERVICE, INC.,

Bankrupt.
----------X

In Bankruptcy
72 B 172

CHARLES GOLD,

Plaintiff-Appellant,

-against-

HERBERT K. LIPPMAN, Trustee in Bankruptcy of Flying Mailmen Service, Inc.,

Defendant-Appellee.
----------X

MEMORANDUM

APPEARANCES:

HENRY & BRECKER, ESQS.
40 Exchange Place
New York, New York 10005
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LASKER, D.J.

Charles Gold appeals from a decision and order of the Bankruptcy Court, Honorable Asa A. Herzog, which denied his application for payment of a secured claim and which ordered him to refund moneys to the trustee in bankruptcy.

In settlement of an action pending in New York Supreme Court, Flying Mailmen Service, Inc. (debtor) agreed to pay Gold the sum of $150,000. The agreement, dated December 16, 1970, specifically allocated 17% of the amount payable as settlement of certain claims Gold might assert against the debtor and 83% as consideration for the repurchase of the debtor's common capital stock held by Gold.[1/] To guarantee payment, the debtor granted Gold a secured lien against all of its present and future assets. Gold filed a financing statement as required by New York law, U.C.C. §9-402.

Gold had received approximately $83,000. when on February 17, 1972 the debtor filed a petition under Chapter XI of the Bankruptcy Act. The debtor was subsequently adjudicated a bankrupt and a trustee in bankruptcy was appointed and qualified. The debtor is in default on the remainder of the debt.

By memoranda dated December 16, 1974 and July 2, 1974, and order dated October 2, 1974, the Bankruptcy Judge declined to enforce the original settlement agreement

between Gold and the debtor or the security interest on the grounds that the executory portions of the agreement and the security interest were unenforceable as a result of the insolvency of the corporation. The judge held that the balance of the monies owed Gold constituted an unsecured claim subordinated to the claims of all general creditors. In addition, Gold was ordered to refund money paid him after the date that the debtor filed his petition in bankruptcy.

I.

The first issue raised by Gold's petition is the validity of the December 16, 1970 settlement agreement and the security interest given to guarantee its performance. The Bankruptcy Judge was correct in finding that the provision of the settlement agreement relating to the repurchase of the debtor's stock (and the security interest guaranteeing that obligation) was unenforceable against the debtor corporation because it was insolvent.

Section 513(a) of the New York Business Corporation Law provides:

> "(a) A corporation, subject to any restrictions contained in its certificate of incorporation, may purchase its own shares, or redeem its redeemable shares, out of surplus except when currently the corporation is insolvent or would thereby be made insolvent."
> (Emphasis added)

Section 514(b) of the Business Corporation Law states:

> "(b) The possibility that a corporation may not be able to purchase its shares under Section 513 shall not be a ground for denying to either party specific performance of an agreement for the purchase by a corporation of its own shares, if at the time for performance the corporation can purchase all or part of such shares under Section 513."

Applying these sections to the present case, the debtor's agreement to repurchase its own stock may have been valid at the time of execution (§513(a)) but the debtor's obligation to pay for the stock became unenforceable upon the debtor's insolvency (§514(b)). Baxter v. Lancer Industries, 213 F.Supp. 92, 96 (E.D.N.Y. 1963); Cross v. Beguelin, 252 N.Y. 262, 265, 169 N.E. 378, 379 1929); and the security interest became unenforceable at the same time. In re Bay Ridge Inn, Inc., 98 F.2d 85, 87 (2d Cir. 1938).

II.

Under New York Business Corporation Law any agreement by an insolvent corporation to repurchase its own stock is unenforceable. As a result, courts have either expunged claims arising from such an agreement, or have subordinated the claim to the claims of all existing creditors on the theory that subordination has the effect

of expungement since the assets of the estate are generally less than the claims of general creditors. First Trust Co. v. Illinois Central R. Co., 256 F.830, 831 (8th Cir. 1919); In re Dawson Brothers Construction Co., 218 F.Supp. 411, 412-413 (N.D.N.Y. 1963). The rights of subsequent creditors who became such without notice of the purchase by the corporation of its own stock are also superior to the selling stockholder's claims. First Trust Co. v. Illinois Central R. Co., supra, 256 F. at 831. However, a subsequent creditor is foreclosed from enjoying this priority if he extended credit with notice of the prior stock purchase by the corporation. Huron Milling Co. v. Hedges, 257 F.2d 258, 263 (2d Cir. 1958); Bay Ridge Inn, 98 F.2d 85, 87 (2d Cir. 1938); Cross v. Bequelin, supra, 252 N.Y. at 266.[2/] As stated earlier, Gold filed a financing statement in accordance with N.Y.U.C.C. §9-402. Gold argues that the filing of the statement constituted the notice necessary to prevail over subsequent creditors and appeals from the decision below which held to the contrary.

The Bankruptcy Judge recognized the exception upon which Gold relies, but held that the filing did not constitute adequate notice because the financing statement did not indicate that the statement related to a debt incurred by the corporation to purchase its own stock.

The narrow question is one of first impression. We agree with the Bankruptcy Judge that Gold's financing statement did not constitute notice sufficient to enable him to prevail over subsequent creditors.

In First Trust Co. v. Illinois Central R. Co., a debtor corporation had repurchased its stock and issued bonds to cover the debt. The mortgage securing the debt was recorded and stated:

> "Whereas it now appears necessary and proper for the purpose of purchasing 1,125 shares of its capital stock from its present shareholders, ... the railroad company has now resolved to issue ... bonds." Supra, 256 Fed. at 831.

The court held that the recorded mortgage "was notice to all the world of the purchase of its own stock by the corporation" and the claims of persons who became creditors subsequent to the recording of the mortgage were therefore subordinate to the rights of the bondholders. No finding was made as to whether the subsequent creditors had actual knowledge. The decision merely remarked:

> "The distinction between subsequent creditors with notice and subsequent creditors without notice, who have become such relying upon appearances which were in fact false and deceitful, is well recognized." Supra, 256 Fed. at 831.

Neither party nor the bankruptcy court has cited any authority which indicates that actual knowledge of a

corporation's repurchase of stock is required. Although the court in Huron Milling Company v. Hedges, supra, did conclude that the creditor there had actual knowledge of the company's prior stock transaction, that conclusion was not determinative of any issue in the case. Indeed, the Huron court cited First Trust Co., supra, for the proposition that "a creditor with Notice" is barred from recovery, using only the term "notice," not "knowledge."

The issue before us then is whether, to constitute adequate notice, a document must specifically indicate that the lien noted secures a debt incurred by a corporation for the repurchase of its own stock.

In In re Dawson Brothers Construction Co., supra, the court refused to accept as sufficient notice to creditors a document filed by the corporation which noted a reduction of capital, but which gave no notice of the deferred obligations simultaneously created. Although the court cited First Trust Co. for the proposition that:

> "[a] subsequent creditor having notice of the impairment of a corporation's capital structure who thereafter extends credit is charged with the notice and effect of such impairment."

it nevertheless concluded, on the facts before it that:

> "There is affirmative evidence that the creditors had no knowledge of the existence of the

> outstanding notes. They then had the right to rely upon the stated capital as a trust fund for their protection." 218 F.Supp. at 413

The fatal deficiency in the document filed was not a failure to note the repurchase of stock, but rather an ellipsis of information as to the corporation's liability for "outstanding notes."

Again, In re Bay Ridge Inn, 98 F.2d 85 (2d Cir. 1938) does not specify that to be effective against later creditors a lien securing a corporation's debt for the purchase of its own stock must indicate on its face the origin of the obligation. Nevertheless, the Court of Appeals there held that the recorded mortgage in question did not constitute adequate notice to subsequent creditors because:

> "On its face the mortgage indicated a consideration moving to the corporation ... The loan was never made and the mortgage was used not to obtain funds for the corporation, but only to give the mortgagees security when they sold their stock. The record gave no notice to creditors of what actually occurred. Creditors who examined the record would have had reason to suppose that the corporate assets were augmented by the amount of a loan of $2025, instead of being depleted by payments to the mortgagees." Supra, 98 F.2d at 87.

The decision falls squarely within the exception stated in First Trust Co. that recorded instruments which contain

"false and deceitful" information cannot be deemed to give notice to subsequent creditors.

Thus although no case has specifically determined whether a notice of lien which does not specify that the underlying debt arose from a corporate repurchase of its stock is adequate to limit the rights of later creditors, the only notices which have been judicially determined to have that effect have contained such information, and we conclude that it is required.

It is true that Gold perfected his lien in compliance with New York law, U.C.C. §9-402, which was enacted to simplify filing procedures, (see Official Comment and New York Commission Comments to §9-402) and "is designed to put creditors on notice that further inquiry is prudent." Marine Midland Bank v. Conerty Pontiac-Buick, 352 N.Y.S. 2d 953, 958 (Sup. Ct. Albany Cty 1974); accord, Bank of Utica v. Smith Richfield Springs, Inc., 294 N.Y.S. 2d 797, 799 (Sup. Ct. Oneida Cty 1968). However, the transaction which gave rise to the lien here does not involve an ordinary purchase and sale contract. Rather, as the court in In re Bay Ridge Inn noted:

> "Where the stockholders imposed a lien upon corporate assets for their own benefit and to secure payments on sale of their stock, they were in effect paying a secret dividend to themselves in derogation of the rights of ... creditors." Supra, 98 F.2d at 87.

Notice of a debt arising out of a corporation's purchase of its own stock should be adequate to ensure that potential creditors are aware not only of the lien but that the underlying transaction has caused a diminution of the corporate capital. Merely to put a creditor "on notice that further inquiry is prudent" is altogether insufficient for that purpose.

Federal law governs the relative priorities of claims asserted against a bankrupt estate. In re Bell Tone Records, 86 F.Supp. 806, 809 (D. N.J. 1949). While that determination should not be made "without appropriate regard for rights acquired under rules of state law" (Prudence Corporation v. Geist, 316 U.S. 89, 95 (1942)), the narrow exception carved here does not undermine the general effect of the U.C.C. filing requirements.

The case at hand involves a special type of transaction; one which not only accorded the corporate creditor a lien against the company's assets -- a perfectly normal matter, and of which normal U.C.C. notice is adequate to alert a later creditor -- but a transaction which simultaneously reduced the corporate capital -- an unusual matter as to which normal U.C.C. notice is inadequate.

Moreover, while it is always a risky game to predict how another court would treat the matter, we can think of no reason why the New York Courts

would construe the application of the statute differently.

III.

The Bankruptcy Judge allocated the $83,000. paid to Gold prior to the debtor's filing of the Chapter XI petition by applying $25,000. to settlement of Gold's claims against the debtor and the remainder of $57,700. to the repurchase of the debtor's stock. His rationale was first, that the agreement specified how monies paid Gold were to be allocated; and second, that while a creditor may normally apply payments to any debts owed by the debtor, payments made by a corporation while it is without surplus must first be credited to claims other than those for monies due on the repurchase of the corporation's shares. In re Bell Tone Records, Inc., supra.

As a result, the court held that no further monies were due Gold and Gold was directed to refund the money he had received subsequent to the filing of the bankruptcy petition.

Gold argues that this apportionment was improper. No finding was made that the debtor lacked surplus at any time prior to the filing of the petition, and Gold contends that any monies he received prior to the filing could be applied as he chose, namely, the debt which represented the repurchase of stock.

We agree with the Bankruptcy Judge's disposition

on the first argument. He properly found that the agreement between Gold and the debtor specified how the monies due were to be allocated. The contract had allocated 17% of the total amount payable as settlement of certain claims and 83% as consideration for the debtor's repurchase of stock, and it is reasonable to conclude that each installment was to be allocated similarly.

However, even if the agreement is so construed, both parties are correct that the case must be remanded for determination of the date of insolvency. If the trustee is correct that the debtor was insolvent as of the date of the execution of the December 16, 1970 agreement, than none of the money paid Gold, either before or after the filing of the bankruptcy petition, can be allocated to the repurchase of stock debt and Gold would have to refund all monies received in excess of $25,000. On the other hand, if the Bankruptcy Judge found that insolvency occurred on a different date, the allocation would be affected accordingly.

IV.

The trustee in bankruptcy urges that we declare the settlement agreement of December 16, 1970 unconscionable and void. This defense was not asserted in the original answer to Gold's petition and the Bankruptcy Judge refused to consider the claim on reargument.

We believe that the Judge could properly refuse to hear the alleged counterclaim since the pleadings were not amended to include it and it was not a proper matter for reargument.

The decision on this point is therefore affirmed without prejudice to the exercise of such rights as the trustee may have to assert the claims hereafter.

The case is remanded to the Bankruptcy Court for further proceedings to determine the date of the debtor's insolvency, to apportion the monies received by Gold accordingly, and to allow the trustee to move to amend his answer.

It is so ordered.

Dated: New York, New York
November 7, 1975

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. The sum of $57,000. was paid upon the execution of the agreement and the balance was to be paid in eighteen bi-monthly installments of $5,138.88, commencing March 1, 1971.

2. The trustee argues that this principle is not applicable because it is a creation of the common law that ceased to exist with the passage of §§513 and 514 of the Business Corporation Law. This contention is without merit. Cases which recognize the exception were based on actions which involved the statutory predecessor to those sections. See Huron Milling Co. v. Hedges, 257 F.2d 258 (2d Cir. 1958); In re Dawson Brothers Construction Co., 218 F. Supp. 411 (N.D.N.Y. 1963); Cross v. Beguelin, 252 N.Y. 262, 169 N.E. 378 (1929).

Service of three (3) copies of the within
is admitted this 20th day of February 1976

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